

MEMO ENDORSED

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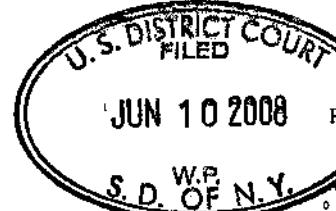
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May 1, 2008

Honorable Kenneth M. Karas
 United States District Court
 Southern District of New York
 300 Quarropas Street
 White Plains, New York 10601

Re: Russo v. Golding, et al.
 Docket No. 07 Civ. 5795 (WP-4)(MDF)
 Our File No. 05-233

Dear Judge Karas:

We represent defendants John Dimilia, Darrel Algaren, and Michael Guedes ("the Wallkill defendants") in the above-referenced action. We write in response to plaintiff's "Opposition" to Judge Fox's Report and Recommendation ("R&R") and ask that the Court accept this letter in lieu of a more formal reply. The Wallkill defendants respectfully request that this Court accept the R&R in full and dismiss all but the excessive force claim against them.¹

In July 2007, the Wallkill defendants moved to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 8. Thereafter, plaintiff agreed to amend his complaint. Upon receipt of plaintiff's amended complaint, in November 2007 the Wallkill defendants moved to dismiss plaintiff's claims, except the excessive force claim, pursuant to Fed. R. Civ. P. 12(b)(6).

The Wallkill defendants moved to dismiss plaintiffs claims for malicious prosecution, false arrest or false imprisonment, unreasonable search and seizure, violation of First Amendment rights, denial of due process and equal protection on the grounds that the claims

¹ Plaintiff's "Opposition" is dated February 22, 2008, but to date this office has not been served by plaintiff. On or about April 3, 2008, the Court provided a copy to this office.

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must be dismissed, under the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) and its progeny, because plaintiff was convicted of crimes arising out of his arrest. The Wallkill defendants also moved to dismiss plaintiff's pendent state claims on the grounds that plaintiff did not file a notice of claim and that these claims are barred by the statute of limitations. The Wallkill defendants did not move to dismiss plaintiff's § 1983 excessive force claim.

In the R&R on defendants' motions, Magistrate Judge Fox recommended that the Court grant the Wallkill defendants' partial motion to dismiss. In doing so, Magistrate Judge Fox made the following determinations:

- "Absent a showing that his conviction has been overturned, Plaintiff's claim for malicious prosecution is therefore barred by *Heck* and should be dismissed." (See R&R at p. 6).
- "Plaintiff's false arrest and false imprisonment claims necessarily call into question the validity of his conviction, and Plaintiff should therefore be barred from advancing these claims until and unless his conviction is overturned." (See R&R at p. 6).
- Plaintiff's claim for unreasonable search and seizure is barred by *Heck* as it calls into question his conviction. (See R&R at p. 7).
- Plaintiff's First Amendment retaliation claims are barred because plaintiff's conviction "is conclusive evidence, as a matter of law, that his arrest was supported by probable cause." (See R&R at p. 9).
- Plaintiff's equal protection claim is barred because plaintiff's First Amendment claim is barred. (See R&R at p. 10).
- Plaintiff's due process claim calls into question the validity of his conviction and is barred. (See R&R at p. 9-10).
- Plaintiff's pendent state law claims are barred by New York General Municipal Law § 50-e for failure to file a notice of claim and expiration of the statute of limitations. (See R&R at p. 12).

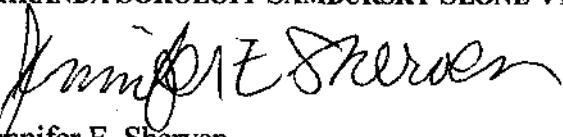
Plaintiff's "Opposition" does not dispute the R&R in substance. We respectfully note that plaintiff's "Opposition" to the R&R actually acknowledges that he was convicted of a crime related to the arrest at issue.

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The Wallkill defendants join in the State defendants' argument with respect to plaintiff's new allegation that a State defendant conspired with a Wallkill defendant to "cover up" unidentified "crimes" the night of plaintiff's arrest at issue. Accordingly, the R&R should be accepted in full by the Court and all claims against the Wallkill defendants, except the excessive force claim, should be dismissed.

Respectfully submitted,
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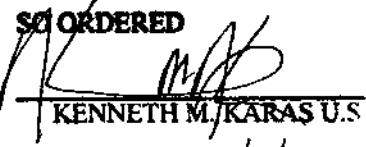


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THE CLERK OF COURT IS
RESPECTFULLY REQUESTED
TO DOCKET THIS LETTER.

SO ORDERED

KENNETH M. KARAS U.S.
6/10/08